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I will take up the request at the Jan. 19 conference which proposed intervenors are free to attend.
SO ORDERED. USDJ
1-11-07

January 11, 2007

BY HAND

The Honorable P. Kevin Castel
United States District Judge
United States Courthouse
500 Pearl Street, Room 2260
New York, NY 10007-1312

Re: Intervention in *Riverkeeper, Inc., et al. v. U.S. Environmental Protection Agency*, Case No. 1:06-cv-12987-PKC

Dear Judge Castel:

Our firm is acting as local counsel for an unincorporated organization, the Cooling Water Intake Structure Coalition (the "Coalition"), which wishes to intervene as of right under Fed. R. Civ. P. 24(a)(2) in support of the defendants in the above-referenced action.[1] The complaint in that case was filed on November 7, 2006, and an initial pretrial conference is scheduled for January 19, 2007. This letter is to request a pre-motion conference as specified by 2.A.1. of your Individual Practices, or a determination that no pre-motion conference is needed in light of the upcoming pretrial conference on January 19th.

Background

In the instant case, the plaintiffs seek a determination that the U.S. Environmental Protection Agency ("EPA") has a duty under Clean Water Act ("CWA") section 316(b), 33 U.S.C. § 1326(b), to issue nationwide, categorical standards for the location, design, construction, and capacity of structures that withdraw surface waters for use in various cooling applications ("cooling water intake structures") at existing industrial, commercial, and smaller electric utility facilities. EPA refers to these as "Phase III" facilities, since EPA already promulgated such standards for new facilities of all types and for existing electric power generation facilities that withdraw 50 million gallons per day or more of cooling water (the Phase I and Phase II standards, respectively). EPA

[1] For purposes of this litigation, the Coalition consists of the American Chemistry Council, the American Forest & Paper Association, the American Iron & Steel Institute, the American Petroleum Institute, General Electric Company, and the Utility Water Act Group.

originally proposed to promulgate uniform national standards for certain Phase III facilities, as well. But EPA ultimately decided for a number of reasons that cooling water intake structures at Phase III facilities are better addressed by allowing permit-issuing authorities to determine on a case-by-case basis what additional measures, if any, are necessary to implement CWA section 316(b). *See* 71 Fed. Reg. at 35,009-35,011; 40 C.F.R. §§ 125.80(c), 125.90(b).

EPA announced that decision in the preamble to "National Pollutant Discharge Elimination System – Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase III Facilities," which was published at 71 Fed. Reg. 35,006 (June 16, 2006). The plaintiffs in this case also filed a petition for review of that final action, pursuant to CWA section 509(b), in the Court of Appeals for the Second Circuit, which was consolidated with other petitions for review and is now pending in the Fifth Circuit as *ConocoPhilips Co., et al. v. Environmental Protection Agency*, No. 06-60662 (and consolidated cases). In the case before you now, the plaintiffs seek essentially the same result: a determination that EPA does not have discretion to choose to regulate cooling water intake structures at Phase III facilities on a case-by-case basis.

Grounds for Intervention

Intervention under Fed. R. Civ. P. 24(a)(2) should be granted when four requirements are established: (1) the application for intervention is timely; (2) the applicant has an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and (4) the applicant's interest would not be represented adequately by the existing parties to the suit. *See, e.g., In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 197 (2d Cir. 2000). The Coalition meets all of those criteria.

The Coalition is proposing to intervene before any responsive pleading has been filed and indeed before any substantive activity at all in the case other than the filing of the complaint. No prejudice would occur to any party from the Coalition's intervention at this time. *See, e.g., United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994).

The members of the Coalition have a strong interest in the subject matter of this litigation. They advocated to EPA, in comments on EPA's proposed rule to issue standards for certain Phase III facilities, that the wide variety of circumstances presented by existing facilities of all types makes it impracticable to issue uniform standards for cooling water intake structures at such facilities. They also commented to EPA that attempting to do so would impose large costs on Phase III facilities to address only a small portion of cooling water withdrawals (approximately 90 percent of which occurs at Phase II facilities), resulting in costs far exceeding any benefits. If this Court were to determine that EPA lacks discretion to choose to address Phase III facilities on a case-by-case basis, members of the Coalition would be faced with such impracticable, costly requirements for their cooling water intakes. This type of interest has repeatedly been held sufficient to warrant intervention as of right. *See, e.g., N.Y. Pub. Interest Research Group, Inc. v. Regents of the Univ. of the State of N.Y.*, 516 F.2d. 350, 351-52 (2d Cir. 1975) (pharmacists' financial stake in upholding a

regulation prohibiting advertisement of prescription drug prices was sufficient to support intervention of pharmaceutical association in action challenging that regulation).

The Coalition's interests are not adequately represented by any other party. The plaintiffs' claims are directly contrary to the Coalition's interests. EPA does not have the direct economic interest in the outcome of this litigation that the Coalition does, and therefore may not present the same arguments as the Coalition would, or with the same vigor. *See N.Y. Public Interest Research Group*, 516 F.2d at 352; *Olympus Corp. v. United States*, 671 F. Supp. 911, 916 (E.D.N.Y. 1985), *aff'd*, 792 F.2d 315 (2nd Cir. 1986), *cert. denied*, 486 U.S. 1042 (1988). Additionally, should there be any settlement negotiations in this case, or other discussions of the appropriate remedy, the Coalition could be affected by what type of rulemaking or other remedy EPA agrees to carry out. *See, e.g., Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123 (2d Cir. 2001) (white male employees could intervene to protect seniority rights that might be affected by implementation of settlement agreement to reverse effects of racial and gender discrimination); *United States Postal Serv. v. Brennan*, 579 F.2d 188, 191 (1978). The Coalition thus more than meets the "minimal" threshold for demonstrating that an intervenor-applicant's interests may not be represented adequately. *See United States Postal Serv.*, 579 F.2d at 191.

For these reasons, the Coalition believes it is entitled to intervene under Fed. R. Civ. P. 24(a)(2). Counsel for the Coalition has contacted counsel for the plaintiffs, who has indicated that the plaintiffs intend to oppose the Coalition's intervention. Counsel for the Coalition also has contacted counsel for the defendants, who has indicated that the defendants neither consent to, nor intend to oppose, the Coalition's intervention. Under the circumstances, the Coalition suggests that no pre-motion conference is necessary, or that the purpose of the pre-motion conference could be served by directing counsel for the Coalition to attend the pretrial conference with the parties that the Court has scheduled for January 19, 2007.

The Coalition also intends to move for the admission *pro hac vice* of Russell S. Frye of Washington, D.C., to act as counsel for the Coalition for the purposes of its motion to intervene, and, if granted, all other matters in this action. Counsel for the plaintiffs and the defendants have advised that they will not object to the pro hac vice motion.

Respectfully submitted,

Jonathan K. Cooperman

cc: Edward Lloyd, Esq. (via e-mail and first class mail)
Reed Super, Esq. (via e-mail and first class mail)
Wendy H. Waszmer, Esq. (via e-mail and first class mail)